

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 SHIHONG MA,) Civil No.07CV0033 JAH(POR)
11 Plaintiff,)
12 v.)
13 MICHAEL CHERTOFF, Secretary of)
the Department of Homeland Security;)
et al.,)
14 Defendants.)
15)
ORDER DENYING DEFENDANTS'
MOTION TO DISMISS AND
GRANTING DEFENDANTS'
ALTERNATIVE MOTION TO
REMAND [DOC. # 8]

INTRODUCTION

Pending before this Court is the motion of defendants Michael Chertoff, Secretary of the Department of Homeland Security; Emilio T. Gonzales, Director; and Robert S. Mueller, Director of the Federal Bureau of Investigation (collectively “defendants”) to dismiss or remand the instant case. The motion has been fully briefed by the parties. After a careful consideration of the pleadings and relevant exhibits submitted, and for the reasons set forth below, this Court DENIES defendants’ motion to dismiss and GRANTS defendants’ alternative motion to remand.

BACKGROUND

Plaintiff Shihong Ma (“plaintiff”), a native of China and a lawful permanent resident of the United States, applied to the United States Citizenship and Immigration Services (“USCIS”) for naturalization on March 23, 2006 and, on July 6, 2006, successfully passed her naturalization interview. Compl. ¶ 8; Mot., Exh. A ¶ 8. On

1 December 29, 2006, plaintiff was informed that USCIS could not adjudicate her
 2 application because her background check was not complete. Compl ¶ 10, Exh. 3.
 3 Plaintiff filed the instant complaint on January 4, 2007, pursuant to 8 U.S.C. § 1447(b),
 4 seeking this Court's adjudication of her naturalization application or for an order directing
 5 USCIS to immediately adjudicate her application. *See* Compl. ¶ 14.

6 On March 9, 2007, defendants moved to dismiss plaintiff's complaint for failure
 7 to state a claim upon which relief can be granted or, in the alternative, to remand the
 8 complaint to the USCIS with instructions to adjudicate plaintiff's application once her
 9 background check has been completed. Plaintiff filed an opposition to the motion on
 10 April 26, 2007 and defendants filed a reply on May 3, 2007. The motion was
 11 subsequently taken under submission without oral argument. *See* CivLR 7.1(d.1).

DISCUSSION

13 1. Legal Standard

14 The "sole authority to naturalize persons as citizens of the United States" rests with
 15 the Secretary of the Department of Homeland Security ("DHS"). 8 U.S.C. § 1421(a).
 16 An applicant must satisfy various requirements to qualify for citizenship and the UCSIS
 17 is required to conduct a personal investigation of the person applying for naturalization
 18 consisting, at a minimum, of a review of all pertinent records. 8 U.S.C. § 1446(a); 8
 19 C.F.R. § 335.1. Title 8, United States Code, Section 1447(b) requires the UCSIS to grant
 20 or deny a citizenship application within 120 days after the date "on which the
 21 examination is conducted under" Section 1446. If the UCSIS fails to act upon the
 22 application within the 120 day period, the applicant may seek a hearing on the matter in
 23 federal district court. *Id.* Section 1447(b) provides that the district court may either (1)
 24 make its own determination of whether the requirements for citizenship have been met;
 25 or (2) remand the matter to the agency with instructions to adjudicate the application.
 26 *Id.*; *see* United States v. Hovsepian, 359 F.3d 1144, 1160 (9th Cir. 2004).

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1 **2. Analysis**

2 **a. Motion to Dismiss**

3 Defendants initially move for dismissal pursuant to Rule 12(b)(6) of the Federal
4 Rules of Civil Procedure but present no argument or authority pursuant to that rule other
5 than a general statement indicating plaintiff's complaint fails to state a claim upon which
6 relief may be granted. *See* Mot. at 1, 3. Defendants argue that plaintiff fails to state a
7 claim because this Court does not have enough information to decide the naturalization
8 application at this time. Id. at 3 ("because the facts of this case do not place the district
9 court in a position to decide the application, Plaintiff has failed to set forth a claim ...").
10 Although defendants adamantly dispute the instant motion seeks dismissal based on lack
11 of subject matter jurisdiction under Rule 12(b)(1), this Court notes that defendants
12 reference documents outside the pleadings which they contend can be properly reviewed
13 on a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).
14 Id. at 2 n.1; *see* Reply at 1. However, because this Court clearly has subject matter
15 jurisdiction under 8 U.S.C. § 1447(b) and plaintiff has properly stated a claim when she
16 invoked Rule 1447(b) after the 120 day period elapsed, this Court finds that dismissal
17 under either Rule 12(b)(6) or Rule 12(b)(1) is not warranted. Accordingly, defendants'
18 motion to dismiss is DENIED.

19 **b. Motion to Remand**

20 It is undisputed that more than 120 days have elapsed since plaintiff's
21 naturalization interview was conducted by UCSIS. Plaintiff, in her complaint, properly
22 invokes Section 1447(b), seeking this Court's adjudication of the naturalization
23 application or, alternatively, an order requiring the USCIS to immediately adjudicate her
24 application. Defendants contend that this Court is not in a position to decide the
25 application at this time and seek remand of the instant case to the UCSIS with
26 instructions to expeditiously adjudicate the application after the background investigation
27 has been completed.

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1 Defendants contend that plaintiff's request for this Court's adjudication of her
 2 naturalization application should be denied in favor of remand because "the facts of this
 3 case do not place the district court in a position to decide the application." Mot. at 4.
 4 In determining that remand is the more appropriate option when faced with an identical
 5 situation as here, one court in this District recently explained that:

6 In immigration matters, the executive branch is accorded great deference, as
 7 evidenced by the statutory and regulatory schemes established for processing
 8 citizenship applications. Neither the [USCIS] nor the district court is
 9 sufficiently informed to decide an application until the FBI completes the
 required criminal background check to determine whether an applicant
 presents any national security or public safety risk, nor are they equipped to
 conduct such investigations themselves.

10 Ghazal v. Gonzales, 2007 WL 1917444 *3 (S.D.Cal. June 14, 2007)(Burns. J.)(internal
 11 citations omitted). The court further explained that:

12 [w]hen the delay in the decision results from the FBI's investigative process,
 13 this court finds it is inappropriate to make a citizenship determination before
 14 that information is known, absent abusive or egregious circumstances not
 present on this record."

15 Id. This Court finds the Ghazal court's reasoning persuasive. Here, because plaintiff's
 16 background investigation is not yet complete, this Court finds that remand is the
 17 appropriate option in this case. This Court further finds that the USCIS is the appropriate
 18 decision-making authority for determining whether to grant or deny plaintiff's
 19 naturalization application.

20 Plaintiff, alternatively, seeks remand but with an order requiring the USCIS to
 21 immediate adjudicate her naturalization application or pursuant to a set timetable for
 22 completion. *See* Compl. ¶ 14; Opp. at 8-9. The court, in Ghazal, upon presentation of a
 23 similar request, "decline[d] to impose particular deadlines for completion of the FBI
 24 checks or the naturalization decision," noting that the plaintiff would not be deprived of
 25 judicial review because he could still seek *de novo* review under 8 U.S.C. § 1421(c) should
 26 his application be administratively denied. Id. Again, this Court finds the Ghazal court's
 27 reasoning sound and applicable in this case. As the Ghazal court found, because "only
 28 the FBI and the [USCIS] are in a position to know what resources are available to conduct

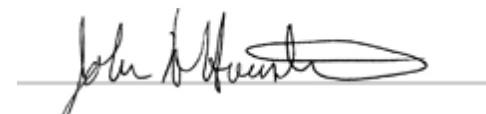
1 the background checks and whether an expedited background check is feasible or efficient
2 in a particular case,"" this Court declines to impose a definitive deadline for either the
3 completion of plaintiff's background investigation or the naturalization decision. Ghazal,
4 2007 WL 1917444 at *3 (quoting Shalabi v. Gonzales, 2006 WL 3032413 *5 (E.D.Mich.
5 Oct. 23, 2006)). Accordingly, defendants' motion to remand to the USCIS with
6 instructions to expeditiously adjudicate plaintiff's naturalization application after the
7 background investigation is completed is GRANTED.

8 **CONCLUSION AND ORDER**

9 Based on the foregoing, IT IS HEREBY ORDERED that:

- 10 1. Defendants' motion to dismiss is **DENIED**;
- 11 2. Defendants' alternative motion to remand is **GRANTED**;
- 12 3. This matter is **REMANDED** to the USCIS with instructions to make a
13 determination on plaintiff's naturalization application as expeditiously as
14 possible after the completion of her background investigation; and
- 15 4. The Clerk of Court shall terminate this action in its entirety.

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17 DATED: August 27, 2007

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19 HON. JOHN A. HOUSTON
20 United States District Judge
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